

The Honorable James Robart

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

DWIGHT HOLLAND,

Plaintiff,

v.

KING COUNTY ADULT
DETENTION, KING COUNTY et al.,
KING COUNTY DISTRICT COURT
EAST DIVISION-Redmond Courthouse
et al., WASHINGTON STATE
DEPARTMENT OF LICENSING, et al.,
WASHINGTON STATE PATROL et al.,
OFFICER WSP ANTHONY BROCK in
his individual and official capacity as
Washington State Patrol officer,
LAKEYSHA NICOLE WASHINGTON
in her individual and official capacity as
Prosecuting attorney, KING COUNTY
PROSECUTING ATTORNEY'S
OFFICE et al., GARY WESTSIDE
TOWING LLC,

Defendants.

NO. 12-cv-0791 JLR

STATE DEFENDANTS' REPLY IN
SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGMENT

**NOTED ON MOTION CALENDAR
FRIDAY, MAY 31, 2013**

I. ARGUMENT IN REPLY

Pro Se Plaintiff Dwight Holland ("Holland") asks the court to accept his own subjective view of the event – that he was not speeding in his "conveyance" or truck, and was not DUI. The "totality of the circumstances" of his DUI arrest, viewed objectively from Trooper Brock's perspective as they must be, demand dismissal of Holland's claims. Further, he cannot maintain his claims against the State Defendants as a matter of law.

1 “[S]ummary judgment should be granted where the nonmoving party fails to offer
 2 evidence from which a reasonable jury could return a verdict in its favor.” *Triton Energy*
 3 *Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir.1995). It should also be granted where
 4 there is a “complete failure of proof concerning an essential element of the non-moving party's
 5 case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).
 6 “[W]hen the facts, as alleged by the non-moving party, are unsupported by the record such that
 7 no reasonable jury could believe them, [the court] need not rely on those facts for purposes of
 8 ruling on the summary judgment motion.” *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir.
 9 2010)(citing *Scott v. Harris*, 550 U.S. 372, 380 (2007). “The mere existence of a scintilla of
 10 evidence in support of the non-moving party's position is not sufficient” to prevent summary
 11 judgment. *Triton Energy Corp.*, 68 F.3d at 1221. Here, the record does not contain a scintilla
 12 of evidence to support Holland’s claims against the State Defendants. Accordingly, they are
 13 entitled to summary judgment of dismissal.

14 **A. No Evidence of Proper Service on State Defendants Requires Dismissal.**

15 As detailed in the State Defendants’ moving papers, Holland has not properly served
 16 them.¹ Holland incorrectly concludes that “service is moot”² because the court discharged its
 17 show cause order for dismissal under FRCP 4(m). In discharging that order, the court
 18 specifically informed Holland: “certain defendants have asserted affirmative defenses
 19 concerning the propriety of service of process” and this order **“does not address the propriety**
 20 **of any service of process performed in this proceeding.”**³ In light of this order on which he
 21 is relying, Holland has no “good cause” for not serving the State Defendants. Holland has
 22 failed to present any affidavit(s) of service on the State Defendants, or any evidence of proper
 23 service on them. Accordingly, his failure to properly serve his Summons and Complaint since
 24 May 2012 results in dismissal of the State Defendants. *See* FRCP 4(m).

25 ¹ State Defendants’ Motion for Summary Judgment, ECF Docket No. 27 at pp. 11-13.

26 ² Opposition, ECF Docket No. 32-1, p. 8:20.

³ ECF Docket No. 14, p. 2, fn. 1 (emphasis added).

B. No Tort Claim For Damages Requires Dismissal of All Tort Claims.

All of Holland's state tort claims are barred because he did not file a claim for damages. Holland does not contend that he did. Rather, he argues a claim for damages "is not a perquisite [sic] to Filing a Title 42 §1983 claim against the 'State'."⁴ Holland is correct. For this reason, the State Defendants' moving papers sought "dismissal of all his claims against the State Defendants, except for his civil rights claims under 42 U.S.C. §1983."⁵

C. WSP and DOL Cannot Be Sued Under §1983; Neither Are "Persons."

Holland did not oppose State Defendants' argument that the Washington State Patrol ("WSP") and the Washington State Department of Licensing ("DOL") cannot be sued under §1983 because neither are "persons" under the Act.⁶ Therefore, he has admitted this. LCR 7(b)(2). It also is the law. Because Holland's tort claims are barred by not filing a claim for damages, and because WSP and DOL cannot be sued under §1983, they are entitled to dismissal.

D. WSP and DOL Also Entitled to Eleventh Amendment Immunity.

Even if WSP and DOL could be sued under §1983 (which they cannot), Holland's §1983 claims would be barred by the Eleventh Amendment (as detailed in defendants' moving papers).⁷ Holland provides no basis for his conclusory remark that "WSP and DOL may not be entitled to enjoy Eleventh Amendment immunity..."⁸ The two recognized exceptions to Eleventh Amendment immunity are congressional abrogation and waiver. *Micomonaco v. State*, 45 F.3d 316, 319 (9th Cir. 1995). There is no evidence that either applies here. Therefore, his §1983 claims against these state agencies are barred by Eleventh Amendment immunity. *See Mitchell v. Los Angeles Community College District*, 861 F.2d 198, 200-01 (9th Cir. 1989).

⁴ ECF Docket No. 32, p. 9.

⁵ State Defendants' Motion for Summary Judgment, ECF Docket No. 27, pp. 13-14.

⁶ State Defendants' Motion for Summary Judgment, ECF Docket No. 27, p. 14.

⁷ State Defendants' Motion for Summary Judgment, ECF Docket No. 27, pp. 14-15.

⁸ Opposition, ECF Docket No. 32-1, p. 9.

1 **E. No § 1983 Claim Against Trooper Brock: Articulate Suspicion Existed to Stop**
 2 **Holland for Speeding, and Probable Cause Existed to Arrest Him for DUI.**

3 Regarding both articulable suspicion to stop for speeding and probable cause to arrest for
 4 DUI, the law requires the court to take into account the “totality of the circumstances” known to
 5 the Trooper. If the circumstances viewed from the Trooper’s perspective establish grounds for a
 6 temporary stop or arrest, there is no Fourth Amendment violation. Further, even if the court
 7 cannot ascertain whether the objective circumstances would authorize the Trooper’s acts, if a
 8 reasonable Trooper could believe his behavior was justified the Trooper is entitled to qualified
 9 immunity. Holland, however, asks the court to disregard this well-established precedent and
 10 ignore circumstances surrounding the traffic stop and DUI arrest – which was audio and video
 11 recorded. He asks the court to accept his own subjective view of the event. The circumstances of
 12 this event, viewed objectively from the Trooper’s perspective as they must be, demand dismissal.

13 In determining “reasonable suspicion” under the law, “[t]he facts are to be interpreted in
 14 light of a trained officer’s experience, and the totality of the circumstances must be taken into
 15 account”. *United States v. Olafson*, 213 F.3d 435, 439 (9th Cir. 2000).

16 Holland does not challenge the Radar results, showing the truck driven by him was
 17 traveling 58 mph in a 45 mph zone. Rather, he contends Trooper Brock “lacked reasonable
 18 suspicion” to conduct a traffic stop because he “misapplied the statue [sic] of Speeding.”⁹
 19 Holland contends “speeding beyond the posted limit the [sic] in itself isn’t necessary speeding,”
 20 citing RCW 4.61.400(1). Holland is mistaken. RCW 4.61.400(2) provides:

21 (2) Except when a special hazard exists that requires lower speed for
 22 compliance with subsection (1) of this section, the limits specified in this
 23 section or established as hereinafter authorized shall be maximum lawful
 24 speeds, and **no person shall drive a vehicle on a highway at a speed in**
 25 **excess of such maximum limits.** [emphasis added]

26 ⁹ Opposition, ECF Docket No. 32-1, p. 3.

1 Here, the stop was authorized with ample reasonable suspicion. It is undisputed Trooper Brock
 2 observed Holland's truck approaching his vehicle from the rear, and his Radar clocked Holland's
 3 truck traveling 58 mph in a 45 mph zone. This stop was authorized.¹⁰ *See Whren v. United*
 4 *States*, 517 U.S. 806, 817-18 (1996) (observation of traffic violation provides cause for stop and
 5 investigation by plainclothes police officer).

6 Holland argues Trooper Brock lacked probable cause to arrest him for DUI based on
 7 Holland's subjective view and self-serving declaration that he did not "have alcohol *that*
 8 *morning*," "was not intoxicated," "did not exhibit signs of being under the influence," and "did
 9 not smell or reek of alcohol".¹¹ *See Head v. Glacier Nw. Inc.*, 413 F.3d 1053, 1059 (9th
 10 Cir.2005) (noting the "longstanding precedent that conclusory declarations are insufficient to
 11 raise a question of material fact").

12 In determining probable cause, the law requires the court to take into account the "totality
 13 of the circumstances" *known to the Trooper*. Probable cause exists when, under the totality of the
 14 circumstances known to the arresting officer, a prudent person would have concluded that there
 15 was a fair probability that the suspect had committed a crime. *Peng v. Mei Chin Penghu*, 335
 16 F.3d 970, 976 (9th Cir. 2003). "It is immaterial whether or not the [arrestee] was actually
 17 violating the law at the time of the arrest if in fact his conduct was such as to lead a reasonable,
 18 prudent officer to believe in good faith he was violating the law." *Sennett v. Zimmerman*, 50
 19 Wn.2d 649, 651, 314 P.2d 414 (1957).

20 Here, as detailed in their moving papers, Trooper Brock had ample probable cause to
 21 arrest Holland for DUI.¹² Trooper Brock is a Drug Recognition Expert. He personally smelled
 22 alcohol on his breath; he saw his very red, bloodshot, and droopy eyes; and he saw him sway
 23 and repeatedly reach back and use the hood of his truck for balance. A reasonable officer
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25 ¹⁰ See State Defendants' Motion for Summary Judgment, ECF Docket No. 27, pp. 2-4.

26 ¹¹ "Plaintiff's Affidavit," ECF Docket No. 32-2, p. 2.

¹² See State Defendants' Motion for Summary Judgment, ECF Docket No. 27, pp. 4-5; 16-18.

1 would have concluded there was a “fair probability” Holland was DUI. *See Hart v. Parks*, 450
 2 F.3d 1059, 1066 (9th Cir.2006) (holding police “must only show that, under the totality of the
 3 circumstances, a prudent person would have concluded that there was a fair probability that the
 4 suspect had committed a crime” (quoting *United States v. Valencia-Amezcu*a, 278 F.3d 901,
 5 906 (9th Cir.2002) (internal quotation marks and alteration omitted))). Under these facts,
 6 Trooper Brock had probable cause to arrest Holland for DUI and his §1983 claims fail.

7 The fact that the criminal charges were later dismissed has no bearing on the probable
 8 cause analysis at the time of the arrest. The standard for “probable cause” at the time of arrest
 9 versus “proof beyond a reasonable doubt” in a criminal proceeding are necessarily distinct.
 10 The DUI charge in the criminal proceeding was dismissed because the State was “unable to
 11 prove the charges beyond a reasonable doubt”. Trooper Brock was not contacted in the
 12 underlying criminal proceeding, nor asked to provide testimony supporting this arrest.

13 Holland’s Fourteenth Amendment claim should also be dismissed because he offered
 14 no opposition to its dismissal. *See* LCR 7(b)(2).

15 **F. No “Fraud” or False Statement by Trooper Brock.**

16 Holland is correct. Trooper Brock’s “Defense Counsel”¹³ – not Trooper Brock – stated
 17 that Holland signed the “Implied Consent Warning for Breath” form and wrote in his
 18 handwriting, “I heard what you read.” This was based on counsel’s review of the document.
 19 Upon further review, this was not Holland’s signature or handwriting. He was handcuffed.
 20 The form actually shows “cuffed” on the signature block written by Trooper Brock (as done on
 21 the first page of the report), and the statement “I heard what you read” written by Brock.
 22 Trooper Brock recorded Holland’s verbal responses. Regardless of whether Holland “signed”
 23 it, the results are the same. He was advised of his rights and refused the breath test.
 24
 25
 26

¹³ Opposition, ECF Docket No. 32, p. 11.

G. No “Unusual Punishment” by Handcuffing Holland. Trooper Brock is Entitled to Qualified Immunity.

Holland appears to argue that Trooper Brock is not entitled to qualified immunity because of “the undue pain” from handcuffing and that this was “unusual punishment.”¹⁴ For support, he relies on *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003). In *Meredith*, an IRS agent conducted a search of a three-story building for evidence of income tax violations. Ms. Bybee lived on the third floor and was not the target of the investigation. When she demanded that the IRS agent produce a search warrant, she claimed the IRS agent “forcibly threw her to ground,” “detained [her] in handcuffs for several hours,” and “during the first 30 minutes the handcuffs were overly tight and caused her pain.” *Id.* at 1061. She “complained several times that the handcuffs were too tight and were causing her pain, but for 30 minutes they were left as they were; thereafter, they were loosened...” *Id.* She sued claiming the IRS agent (1) unlawfully detained her and (2) used excessive force in handcuffing her. Under these facts, the court held the IRS agent was not entitled to qualified immunity as the plaintiff “was unlawfully detained for 30 minutes in overly tight handcuffs that caused her pain.” *Id.* at 1065.

Holland’s case is easily distinguished from *Meredith v. Erath*. Unlike in *Meredith*, where the plaintiff spent 30 minutes in overly tight handcuffs and complained of pain, Holland had only seconds of discomfort before Trooper Brock adjusted them. This exchange is captured on the audio recording of Holland’s arrest.¹⁵ As can be heard, Trooper Brock went out of his way to make Holland comfortable in handcuffs. Trooper Brock combined two sets of handcuffs to make them longer in length, as Holland has wide shoulders. **40 seconds** after Holland complained his handcuffs were tight, Trooper Brock helped him out of the patrol car and adjusted them. He explained why they were binding – which was due to Holland turning his wrists. This entire exchange took about two and a half minutes. He was handcuffed at

¹⁴ Opposition, ECF Docket No. 32-1, p. 12.

¹⁵ Exhibit 1 (DVD) to Declaration of Trooper Brock, Track “**B_T16@...**,” at 1:38:40 seconds to 1:41:12 seconds. (Note that 1:38:40 is the time stamp, and refers to 1:38 a.m. at 40 seconds.)

1 1:36:08; he complained at **1:38:47**; he was taken back out of the patrol car at **1:39:27**; his
 2 handcuffs were adjusted at **1:40:19**; and he was placed back in the patrol car at 1:41:35.¹⁶
 3 Holland *never again mentioned* any handcuff discomfort to Trooper Brock. The entire
 4 transport from the scene to the police station was video and audio recorded, and Holland never
 5 mentioned any discomfort. An after-the-fact alleged photograph of a mark on his wrist does
 6 not change the analysis here. This is particularly the case here when he not only never
 7 complained again to Trooper Brock about any wrist discomfort, but also never complained of
 8 any wrist discomfort during in-processing or his stay at the King County Jail.

9 Under these facts, there is no evidence that a reasonable officer would have believed
 10 that Trooper Brock's conduct was unlawful in the situation he confronted. The qualified
 11 immunity standard "gives ample room for mistaken judgments by protecting all but the plainly
 12 incompetent or those who knowingly violate the law". *Hunter v. Bryant*, 502 U.S. 224, 229
 13 (1991) (per curiam)(internal citation and quotation omitted). If an officer could have
 14 reasonably, but mistakenly, believed his conduct did not violate a clearly established
 15 constitutional right, qualified immunity is appropriate. *Skoog v. County of Clackamas*, 469
 16 F.3d 1221, 1229 (9th Cir. 2006). Here, Trooper Brock had no reason to believe Holland's
 17 handcuffing was improper in any way. He went above and beyond the call of duty to make
 18 Holland comfortable.

19 Therefore, for the reasons here and those set forth in defendants' moving papers,
 20 Trooper Brock did not violate Holland's constitutional rights. Even if a constitutional right
 21 violation occurred (which it did not), Trooper Brock is entitled to qualified immunity as a
 22 matter of law.

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 26 ¹⁶ Exhibit 1 (DVD) to Declaration of Trooper Brock, Track "**B_T16@...**," at 1:38:40 seconds to 1:41:12
 seconds. (Note that 1:38:40 is the time stamp, and refers to 1:38 a.m. at 40 seconds.)

H. Holland Did Not Oppose Dismissal of §1983 Claim Against DOL.

The State Defendants moved to dismiss Holland’s §1983 “due process” claim against DOL.¹⁷ Holland did not oppose this dismissal. Accordingly, the court may consider this an admission that this claim has no merit and should be dismissed. *See* LCR 7(b)(2).

I. No Claim Against State Defendants for Alleged “Speedy Trial” Violation and Probable Cause Hearing Not Within 48 Hours of Arrest.

For three reasons, Holland has no basis for an alleged “speedy trial” violation and not receiving a probable cause determination within “48 hours of arrest.” First, his Complaint does not allege these claims against the State Defendants. He raises them for the first time in his opposition.¹⁸ Second, they do not and cannot apply to the State Defendants (the WSP, DOL, and Trooper Brock). They are not involved with either. Trooper Brock had no duty to “bring [Holland] before a magistrate” for a probable cause determination to spare him “the indignity of jail”. Trooper Brock, the WSP, and the DOL also had no involvement with any criminal trial setting. Holland appears to recognize this, claiming it was the “King County Prosecuting Attorney Office” that “dropped the ball” by not giving him a speedy trial. No ball was dropped. Third, Holland misunderstands the application of the speedy-trial rule and a probable cause determination. In short, he has no grounds for such claims or any evidence to support them against the State Defendants, or any other defendant – including the King County Prosecuting Attorney’s Office.

J. No Claims Can Be Maintained Against the WSP.

The State Defendants moved to dismiss Holland’s claims that the WSP negligently supervised and trained Trooper Brock. First, these claims are barred by the claims filing statutes, as Holland failed to file a claim for damages. Second, even if they were not barred, they cannot be maintained. Holland has presented no evidence to support these claims. He cannot show that

¹⁷ *See* State Defendants’ Motion for Summary Judgment, ECF Docket No. 27, pp. 18-19.

¹⁸ Opposition, ECF Docket No. 32-1, pp. 7-8.

1 Trooper Brock or the WSP breached any standard of care, or that such breach proximately caused
 2 his alleged false arrest. It remains undisputed that Trooper Brock is a highly-trained State
 3 Trooper, with an exemplary record of service.

4 **K. No State Tort Claims Can Be Maintained.**

5 Even if his state tort claims were not barred by his failure to comply with the claims filing
 6 statutes, they cannot be maintained as a matter of law for the reasons set forth in defendants'
 7 moving papers.¹⁹ Second, they are barred by state law qualified immunity. Here, Trooper Brock
 8 moved for dismissal of all state claims based on his entitlement to state law qualified immunity.²⁰
 9 Holland did not oppose this ground for dismissal. Accordingly, the court may consider this an
 10 admission that his state claims should be dismissed. *See* LCR 7(b)(2).

11 **II. CONCLUSION**

12 For these reasons and those set forth in their moving papers, the State Defendants
 13 respectfully request summary judgment of dismissal.

14 DATED this 31st day of May, 2013.

15 ROBERT M. McKenna
 16 Attorney General

17 *s/ Tobin Dale*
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 26 ¹⁹ *See* State Defendants' Motion for Summary Judgment, ECF Docket No. 27, pp. 19-22.

²⁰ *See* State Defendants' Motion for Summary Judgment, ECF Docket No. 27, pp. 23-24.

CERTIFICATION OF SERVICE

I hereby certify that on this 31st day of May, 2013, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

Samantha Kenner: Samantha.kanner@kingcounty.gov

Dwight Holland: dmanh3@comcast.net

/s/ Tobin Dale

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